IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1065 OF 2004

Govind Savlaram Nehe
(since deceased through L.R.)
Smt.Kamlabai Govind Nehe ...Appellant

vs.

Govind Laxman Rajendra & Ors. ...Respondents

Mr.K.K.Tated, A.G.P.
Mr.S.M.Gorwadkar for Respondent No.1
Mr.M.M.Sathaye for Respondent No.18

CORAM: A.S.OKA,J.
DATE : MAY 5,2005.

P.C.:

1. Heard Counsel appearing for the parties. The Appeal is by unsuccessful Plaintiff. The Appellant-Plaintiff filed a suit for declaration that the decree passed in R.C.S.No.219 of 1957 was not binding on him and that the Respondent Nos.1 to 7 have no right to take the possession of the suit property on the basis of the said decree. The Trial Court decreed the suit.

The decree has been reversed in an Appeal.

2. The learned Counsel for the Appellant submitted that the Appellate Court has purported to decide the issues which could have been decided only by the Agricultural Lands Tribunal under the Bombay Tenancy and Agricultural Lands Act, 1948. He submitted that the Appellate court has committed an error by ignoring that the earlier application made by the Appellant

under Order XXI Rule 97 of the Code of Civil Procedure, 1908 was not decided on merits but was dismissed on the ground that it is not maintainable.

3. The learned Counsel for the Respondents have submitted that it is obvious from the averments made in the plaint that the Appellant is claiming through Judgment Debtor and therefore no interference is called for.

4. Considering the averments made in the plaint, it is obvious that the objections which are raised in the plaint cannot be raised by way of a separate suit in view of the provisions or Rules 97, 101 and 103 of Order XXI of the said Code and the said objections can be raised only in execution proceedings. The Appellate Court has recorded a finding to that effect and has held that the suit was not maintainable.

5. I find no fault with the said findings recorded by the Appellate Court. My attention has been invited to the order passed on 29th November 1979 by the executing Court on the applications under Rule 97 of Order XXI of the said Code. The said order shows that the application made by the original Plaintiff was rejected on the ground that a third party cannot apply under Rule 97 of Order XXI of the said Code. My attention was also invited to the Judgment and Order passed by the District Judge in an Appeal challenging the order dated 29th November 1979. Perusal of the said orders show that

there is no adjudication made on merits as required under Order XXI Rule 97 of the said Code.

6. The Appellate Court has rightly held that the suit filed by the Appellant was not maintainable in view of the provisions of Rule 97 and 103 of Order XXI of the said Code. The objections raised by the Plaintiff in this suit cannot be considered by way of a separate suit. Hence, no interference is called for and accordingly, the Appeal is dismissed with no order as to costs.

7. At this stage, the learned Counsel for the Appellant states that ad-interim order passed to be continued for a reasonable period. The learned Counsel appearing for the Respondent No.1 states that the executing court has not issued possession warrant as of today. The prayer made by the learned Counsel for the Appellant is rejected.

JUDGE.